

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & affidavit of mailing

77-1430

RONALD RUSSO

To be argued by

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1430

UNITED STATES OF AMERICA,

—against—

JAMES BENNETT,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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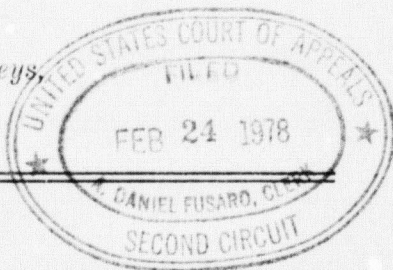


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
The evidence was sufficient to sustain the conviction	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<i>Rogers v. United States</i> , 422 U.S. 35 (1974)	8
<i>Roy v. United States</i> , 416 F.2d 874 (9th Cir. 1969) .	5, 8
<i>United States v. Compton</i> , 428 F.2d 18 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 1014 (1971) .	5, 6, 7, 8
<i>United States v. Hart</i> , 457 F.2d 1087 (10th Cir.), <i>cert. denied</i> , 409 U.S. 861 (1972)	8
<i>United States v. Lincoln</i> , 462 F.2d 1368 (6th Cir.), <i>cert. denied</i> , 409 U.S. 952 (1972)	8
<i>United States v. Patillo</i> , 438 F.2d 13 (4th Cir. 1971)	5
<i>United States v. Watts</i> , 394 U.S. 705	5, 7, 8

Statutes:

18 U.S.C. § 871(a)	1, 5
18 U.S.C. § 4205(b)(2)	1

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Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by defendant James Bennett from a judgment of the United States District Court for the Eastern District of New York (Pratt, J.) entered on August 8, 1977, following a jury verdict, convicting Bennett of threatening the life of the President of the United States, in violation of Title 18, United States Code, Section 871(a). On September 16, 1977 Bennett was sentenced to a period of imprisonment of five years.¹

¹ In sentencing Bennett, the Court noted that he was to be eligible for parole pursuant to Title 18 U.S.C. § 4205(b)(2). The court further recommended that "defendant be sent to Springfield, Mo. for medical, dental and psychiatric treatment and care with recommendation that Parole Commission look primarily to medical and psychiatric opinion as to appropriate time for release". (Appellant's Appendix 2).

The sole issue raised on this appeal is whether the evidence was sufficient to sustain the conviction under the applicable statute.

Statement of Facts

On the evening of January 23, 1977 Special Agent Joseph W. Bergman of the United States Secret Service received a phone call from an individual who identified himself as James Edwin Bennett, Jr., and who stated that he was going to Washington "to embarrass somebody in the White House" (Tr. 52). Bergman, who recognized Bennett's name, asked the caller whether he would meet with Secret Service agents before going to Washington (Tr. 53). Bennett stated that he would and suggested that they meet at the Second Squad of the Suffolk County Police Department (Tr. 53). Bergman then relayed the information to Special Agent John Viggiano who travelled to the Second Squad to interview the caller (Tr. 55, 60-61). Upon his arrival Viggiano was informed that Bennett was not there (Tr. 61). Viggiano, in an attempt to locate Bennett, went to Bennett's home and to several local bars but could not find him (Tr. 61-62).

On January 25, 1977 at 7:30 P.M. Viggiano himself received a phone call from an individual identifying himself as James Edwin Bennett. Bennett said that he wanted to speak with a Secret Service agent about his plans to "embarrass" the President. (Tr. 63). Viggiano asked Bennett if he would meet with Secret Service agents, and Bennett said he would meet them that evening at the Headquarters Bar in Commack, Long Island. Viggiano, accompanied by Secret Service Agent Brendan Soden, arrived at the Headquarters Bar at approximately 10:00 P.M., met Bennett and engaged him in a conversation. Bennett discussed a number of issues including the

problems in Northern Ireland, his dissatisfaction with the treatment he had received at Veterans Hospitals, certain family problems and President Carter's then-recent amnesty decision (Tr. 67, 105). In the course of the conversation Bennett stated that he was going to the White House to "embarrass" the President. When the agents indicated that it would be impossible for Bennett to get into the White House, Bennett stated that it would be no problem for a man like himself (Tr. 70). Bennett elaborated on the fact that he had been on a tour of the White House and was familiar with the layout of the White House and its grounds. He further stated that on a previous occasion he had gone to the White House but was met at the gates by a Secret Service agent who denied him entry. Bennett was committed to St. Elizabeth's Hospital for observation on that occasion (Tr. 108-109). As the conversation continued, both agents observed that Bennett was becoming more irate and aggressive (Tr. 71, 109). Agent Viggiano testified as follows:

Q. At that point, what if anything did you do?

A. At that point, what I tried to do is get his true feelings for the President. We began to talk about just his feelings toward the President and we left the arm out of the conversation. We talked about the President and tried to get his feelings for the President and he said, "I'm going to kill him. I'm going to kill the President."

Q. It was not in a hypothetical sense?

A. No. It was a statement.

Q. It was not connected with the hypothetical, if he doesn't do such and such?

A. Correct, it was not connected with the hypothetical.

Q. Sir, was it your impression that was a serious threat?

A. Yes, it was (Tr. 71-72).

After both agents, each experienced in the protective functions of the Secret Service, had heard Bennett utter what they deemed to be a serious threat against the life of the President, Bennett was placed under arrest (Tr. 77, 110).

In addition to the three agents previously named, the jury also heard Secret Service Agent Robert Lee testify that he had received a phone call on October 25, 1976 from an individual who identified himself as James Bennett. The caller stated that "Something had triggered him off" and he would be travelling to Washington on October 26, 1976 to "embarrass" then-President Gerald Ford (Tr. 143-45). While declining to detail the manner in which he would "embarrass" the President, the caller did state that he knew the President's schedule and added: "I may get my head blown off trying it or doing it, but I'm going to embarrass the President"² (Tr. 146, 148-49). The caller, when asked for his date of birth, gave May 22, 1931, Mr. Bennett's date of birth (Tr. 147).

The defendant did not testify and no defense was presented.

² It should be noted that when Bennett called Special Agent Lee on October 25, Bennett told Lee "I'm the one that hijacked the plane from Miami to New York and I also held up a bank, so, you know, you guys know me, you know I can do this or you know I will do this" (Tr. 127). Although the Government did not attempt to prove that Bennett had, in fact, hijacked an airliner or robbed a bank, it did ask the trial court to permit the jury to hear the totality of Bennett's remarks to Lee including references to Bennett's previous acts. Ruling that such evidence would be highly prejudicial while having little probative weight as to defendant's intent on January 25, 1977, the court sustained defendant's objection and redacted Agent Lee's testimony accordingly (Tr. 129-140).

ARGUMENT

The evidence was sufficient to sustain the conviction.

Title 18, United States Code, Section 871 (a) reads in relevant part:

"Whoever . . . knowingly and wilfully . . . otherwise makes any * * * threat [to take the life of or to inflict bodily harm upon the President] . . . shall be fined not more than \$1,000 or imprisoned not more than five years or both."

The purpose of this statute has been discussed at length by a number of appellate courts. *United States v. Patillo*, 438 F.2d 13 (4th Cir. 1971); *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969). In enunciating the legislative intent of Section 871, this Court, in *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970); *cert. denied*, 401 U.S. 1014 (1971), adopted the reasoning of the Fourth Circuit in *Roy, supra*:

"Thus it appears that the statute was designed in part to prevent an evil other than assaults upon the President or incitement to assault the President. It is our view that the other evil is the detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life." 428 F.2d at 21.

And the sole issue raised here is whether the jury properly found that Bennett's threat was "true" or "serious" rather than mere political hyperbole, *United States v. Watts*, 394 U.S. 705, 708 (1969); *United States v. Compton, supra*, 428 F.2d at 22.

Notwithstanding appellant's argument to the contrary, this very issue has been resolved by this Court and others in closely similar cases. *Compton, supra*, is such a case.

Compton placed a phone call to the authorities and stated that he intended to assassinate then-President Nixon because he did not like the President or the Republicans and because the President was "destroying the nation". Compton also stated that "God told" him to carry out the mission and that he could not locate his weapon, which was concealed in a secret hiding place where "God had told" him to hide it. Compton gave the police his name and told them where he could be located. He was arrested shortly thereafter. Compton was not near the President when he uttered his threat; he was unarmed when arrested; he had previously threatened the President's life; he told the authorities where he could be found; the defense of insanity was not raised. In each instance *Compton* parallels the instant appeal. The issue of whether the threat was a serious one was a question of fact for the jury to decide in *Compton* as well as in this case. This Court, in affirming Compton's conviction, found the trial court's charge to be fair and adequate in that it clearly explained the difference between political hyperbole and a serious threat. 428 F.2d at 22. The trial court herein charged the jury on this issue as follows:

"As to the second element, that these words constituted a "true threat", the term "threat" means an avowed present determination or intent to injure presently or in the future. The Government must establish a true threat, which means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest.

In determining whether words were uttered as a true threat, you must consider the context in which they were spoken. As I've already told you the offense charged does not apply to a statement made in jest or as political hyperbole, and understood as such. Therefore, you should acquit the defendant unless you find that, under all the circumstances, a reasonable person would foresee that

the words uttered would be interpreted by persons hearing them as an expression of intent to inflict bodily harm upon or take the life of the President. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President." (Tr. 195-196).

It is respectfully submitted that the trial court's charge was eminently fair and wholly in accord with the principles set forth by this Court in *Compton*. Clearly, it was for the jury to determine, in light of all the circumstances, whether a reasonable person would interpret Bennett's remarks as being a serious threat to the life of the President. Appellant gratuitously states that, under the circumstances, no reasonable person could possibly so find. It is respectfully submitted, however, that twelve properly instructed jurors did find that Bennett's remarks were a serious threat against the President rather than simply a complaint "about a variety of public and political issues" as appellant here argues (Br. 19). The evidence was more than ample to sustain the conviction.

Appellant relies heavily upon *Watts v. United States*, *supra*, in attacking the instant conviction (Br. 9-12). A reading of *Watts* indicates that appellant's reliance is misplaced. In *Watts* the defendant was arrested during a public rally on the grounds of the Washington Monument. Watts, who was then 18 years old, was participating in a discussion group on police brutality. He had just received a 1-A draft status and his army physical was imminent. The statement which caused Watts' arrest was: "If they ever make me carry a rifle the first man I want in my sights is L.B.J." 394 U.S. at 706. The crowd reacted to the statement with laughter. The Court held Watts' statement to be nothing more than a statement of political opposition to the President. The instant appeal is a far different case. Watts did not make his statement to the authorities; his statement was not preceded by numerous other threatening statements (such as appellant's repeated

assertions that he planned to "embarrass" the President); he had no history of threatening the President; he made no reference to gaining access to the White House; his statement was expressly conditional: In sum, *Watts* is easily distinguishable from the instant case and offers appellant's position no support.³

³ Although the appellant does not rely upon the case of *Rogers v. United States*, 422 U.S. 35 (1974), it should be noted that in *Rogers* the Court granted *certiorari* to resolve "an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by Section 871(a)." *Id.* at 36. Following full briefing and argument, the Court chose not to resolve that conflict but reversed on other grounds. Mr. Justice Marshall, while concurring in the result, discussed the elements of Section 871(a). In so doing he took exception with a number of circuit court decisions which held that a conviction under Section 871(a) would be affirmed where the defendant made a statement that would reasonably be understood as a threat as long as the defendant intended to make the statement and knew the meaning of the words used. See *United States v. Lincoln*, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States v. Hart*, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972); *United States v. Compton*, *supra*; *Roy v. United States*, *supra*; *Watts v. United States*, 131 U.S. App. D.C. 125, 402 F.2d 676 (1968), *rev'd on other grounds*, 394 U.S. 705 (1969). Mr. Justice Marshall suggested that something more should be required. In addition to the elements previously noted, he would require that the Government show that the speaker *intended his statement to be taken as a threat*. *Id.* at 48. It must be noted that such a requirement goes beyond the holding of any decision of the Court and is contrary to the law of this Circuit. See *Compton*, *supra*. However, assuming *arguendo* that the trial court should have so charged the jury, it is, at best, harmless error to have omitted such instruction. Surely, Bennett's intent in threatening the President's life on more than one occasion was that his threats be taken seriously. Bennett's threat was not uttered under circumstances that would permit him to argue he was joking. Rather he made the threats to Secret Service agents while he was irate, angry and aggressive (Tr. 71, 109-110). It is submitted that even under Mr. Justice Marshall's "subjective intention standard" (contained in an advisory opinion which does not bind this Court), the evidence overwhelmingly pointed to conviction.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February , 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 24th day of February 19 78 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

H. Elliot Wales, Esq., 122 E. 42nd St. New York, N.Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

24th day of February 19 78

Barbara Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979

